IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR

:: O R D E R ::

Suresh Nath Modi V/s The Addl. District Judge (Fast Track.), Parbatsar

S.B.CIVIL WRIT PETITION NO.4462/2004 UNDER ARTICLES 226 AND 227 OF THE CONSTITUTION OF INDIA.

DATE OF ORDER :: 09.12.2004

PRESENT

HON'BLE MR. PRAKASH TATIA,J.

Mr.J.R. Patel, for the petitioner/s
Mr.S.L. Jain, for the respondent/s

BY THE COURT :

Heard learned counsel for the parties.

By this writ petition, petitioner has challenged the order of the trial court dated 31.5.2004 (Annexure-2), by which the trial court closed the cross-examination of the defendant Witness DW/2 Kanmal after refusing the request for adjournment made on behalf of the learned counsel for the plaintiff and the order dated 20.9.2004 (Annex.6). The petitioner also challenged the order dated 20.9.2004 by which the trial court dismissed the application of the

petitioner, by which the petitioner – plaintiff requested that one opportunity be granted to the petitioner to cross-examine the witness of the defendant.

According to the learned counsel for the petitioner, the trial court should have granted at least one opportunity for cross-examination of only witness of the defendant and by this the trial court could have done the justice to the parties.

Learned counsel for the respondent vehemently submits that there is no jurisdictional error in the order under challenge and looking to the limited scope under Article 226 of the Constitution of India, this court should not interfere in the orders passed by the court below.

Learned counsel for the respondent relied upon the judgment of this Court delivered in the case of Arjun Singh V/s A.D.J. Behror and Anr. reported in 2004 Vol.4 WLC 131 wherein the evidence was closed after giving several opportunities to the defendant to lead evidence but the defendant failed to avail the opportunity. This Court referred earlier decision in which it was observed that in exercise of certiorari or supervisory jurisdiction, the High Court will not

convert itself into a court of appeal and indulge in re-appreciation or evaluation of evidence or correct errors in drawing interferences or correct errors of mere formal or technical character. Where a subordinate court has assumed a jurisdiction which it does not have or has failed to exercise a jurisdiction which it has or the jurisdiction though available is being exercised in a manner not permitted by law and failure of justice or grave injustice has resulted, the High Court may step into exercise its supervisory jurisdiction.

Learned counsel for the respondent further submits that several adjournments were sought by the plaintiff-petitioner and therefore, the petitioner is not entitled for any relief under Article 227 of the Constitution of India.

I perused the facts of the case and considered the submissions of the learned counsel for the parties.

Before examining the submissions of the learned counsel for the parties, it is worthwhile to mention here that Order XVII of the Civil Procedure Code provides for adjournments during the trial of a suit. Sub-Rule (1) of Rule 1 of Order XVII permits the

adjournment and also provides that the court should record the reason for adjourning the cases. The proviso appended to Sub-Rule (1) of Rule 1 of Order XVII is as under :-

> "Provided that no such adjournment shall be granted more than three times to a party during hearing of the suits."

By this provision it is provided that no adjournment can be granted beyond three times to a party but there is no such restriction upon the court to adjourn the case. Obvious reason is that it was left to the discretion of the court how to regulate their own working. There cannot be a water tight jacket formula for making the calendar for the courts for deciding the case pending before it.

The proviso (a) of Sub- Rule (2) of Rule 1 of Order XVII is as under :-

> "(a)- Provided that <u>when the hearing of the suit has commenced, it shall be continued from day-to-day until all the witnesses in attendance have been examined,</u> unless the Court finds that, <u>for the exceptional reasons to be recorded by it,</u> the adjournment of the hearing beyond the following day is necessary."

In the light of above provision, every court is required to hear the suit and continue it from the day to day until all the witnesses in attendance have been examined. In this very provision, it has been clearly mentioned that unless the court finds that, for the exceptional reasons, the adjournment of the hearing beyond the following day is necessary, the court cannot adjourn the case. For adjoining the court must record reasons. The provision was inserted in the statute as back as in the year 1977 and this Court can take judicial notice of this fact, that this proviso was never followed by any court because it was not possible for the court to follow it and do justice. Not only cases are not adjourned beyond next day without recording "exceptional reasons" but adjourned without recording reasons and every body knows that court cannot fix the case next day due to court's own work load.

Clause (b) of said proviso provides that no adjournment shall be granted at the request of the party, except where the circumstances are beyond the control of that party. This proviso was never adhered to by the Court. If order-sheets placed on record of this case are read, it will make it clear that all the adjournments were granted on the mere request of the parties only, without recording the reason and the

circumstances for adjourning the case and after recording that the circumstances were beyond the control of the party seeking the adjournment.

Clause (c) of the proviso provides that the Court shall not grant adjournment on the ground that the pleader of a party is engaged in another court.

Clause (d) of proviso says that even on the count of illness of a pleader or his inability to conduct the case for any reason, the court shall not grant the adjournment unless it is satisfied that the party could not have engaged another pleader in time. It may be noticed that the adjournment is permitted on account of inability of advocate to conduct the case in all cases but not when the counsel is engaged in the Court. By Clause (d) of proviso to Sub-Rule (2) of Rule 1 of Order XVII, for adjournment of case on the ground of Advocate being busy in the court has been excluded specifically.

These provisos were also never followed by any Court. If these provisions are followed, it may have a serious consequence. If a counsel is engaged in another Court and is not in position to attend the case when called due to said reason, then what the party can do ? Can an advocate return the brief at

that last moment ?

In the trial court and even before the appellate court but more in trial court, an advocate gives shape to the case and he is supposed to know every proceedings taken in the suit along with the facts of the case and he is to assist the court. All of sudden, if advocate is to return file to client than what that new advocate can do in the court proceedings ? Can court decides the suits or should court decides the suits without assistance of advocate? Apart from it, what is fault of the litigant so that he may be taxed fees twice or more and more grave is, to deprive him from help of his advocate in whom he has faith.

At this stage, it is relevant to mention here that Chapter XVII is not confined to recording the evidence only, therefore, if the rule (c) and (d) are read together, it will mean that if a case is fixed for final arguments in the trial court it cannot be adjourned though the party may not have any time to engage the advocate in such situation as the adjournment is specifically excluded in above situation.

The above provisions are examined by this Court because of fact that in this case, the cross-

examination of defendant's last witness was denied by the trial court by the impugned order dated 31.5.2004. The adjournment was sought for cross-examination of only one witness of the defendant and that was denied by the Court. It will be worthwhile to mention here that on 31.5.2004 itself the defendant completed examination- in – chief of his witness DW-2 Kanmal and on that very day the Court closed the right of cross-examination of the plaintiff despite the request made on behalf of the counsel for the plaintiff. If all other order-sheets placed on record starting from 4.9.2000 to 31.5.2004, are examined, then it makes clear that the court below granted adjournments whenever sought by the parties beyond the time limited by the proviso to Sub-Rule (1) of Order XVII. The cross-examination of the defendant’s witness was closed even when there was provision for adjourning the case at least for next day in view of proviso (a) of Sub-Rule (2) of Order XVII. The request was made on behalf of the plaintiff for adjourning case on the ground that the plaintiff’s counsel has not come to the Court and not on the ground that he is busy in another Court. The trial Court only observed that the case can be adjourned only when the circumstance is beyond the control of the party. The trial court also referred that the case cannot be adjourned on account of the counsel being busy in another court but the

trial court has not taken note that the adjournment was not sought on this count but was sought because the counsel has not come to court. (Advocate busy in court is not a ground for adjourning the case but not busy in court may be a ground for consideration).

Therefore, law providing procedure for conducting the case must have faith in the courts as well as in advocates and certain things are required to be left to the discretion of the Court instead of regulating by making time as essence of the part of the procedure. No one can make a complete catalogue of all contingencies which may come in future during the proceedings of a suit.

In cases where delay is of one day, the trial court by taking help of provision making the time as essence passes orders then the appellate courts or revisional courts set-aside the orders just for asking and it becomes very difficult for the defending party to defend the order, particularly in the matter of closure of evidence, in the matter of not filing of the written statement in time etc. By this, only the trial is delayed and time of the Court is unnecessarily consumed for deciding such type of petty matters. The litigants are incurring huge expenditure because of this.

Therefore, unless, the trial courts effectively control their proceedings by application of mind and by proceeding with the case in more practical manner, the suits cannot be decided by the trial court nor unnecessary appeals, revisions and now writs can be avoided. It is more a case management rather then asking the court to pass orders within the frame work of time only by ignoring the real issues like the total work pending in the courts.

It was needed because of the fact that the learned counsel for the petitioner has raised the objection that under Article 227 of the Constitution of India the scope for interference with the order passed by the trial court is very limited. The fact shows that the extra-ordinary jurisdiction under Article 227 of the Constitution of India is not meant for accepting the technicalities of law only for denying the relief. The extra-ordinary jurisdiction equitable under Article 227 of the Constitution of India is to do the justice and to make the extra-ordinary jurisdiction as extra-ordinary to be used in extra-ordinary situation where the parties are left with no alternate but to challenge the order forthwith so that they may get the correction of the procedure of the trial court and that will ultimately result into avoiding unnecessary demand by Appellate or Revisional Court or

by the High Court even in writ jurisdiction after curtailment of the power (if any) by amendment in the Civil Procedure Code.

This Court, therefore, has no hesitation in holding that this court can certainly interfere in the orders passed by the trial court even when they fall within the frame work of any provision of law but cannot be justified if examined by the High Court in exercise of its supervisions power under Article 227 of the Constitution of India, because the Article 227 of the Constitution of India is not subordinate to the law provided under the Civil Procedure Code and can grant appropriate relief.

At this stage, it will be relevant to mention here that this Court also perused the every order-sheet and found that the adjournments were sought by both the parties almost equally and at the same time, the court also adjourned the same, despite the fact the witnesses were present in the court the case was adjourned because of the fact that either the Presiding Officer was on leave or the post was vacant due to the transfer of the Presiding Officer.

Therefore, the Court should frame their time table so as to advance the justice by deciding the cases

expeditiously and by passing appropriate orders which may avoid the delay in the proceedings and should also exercise their discretion in balanced manner by not granting unnecessary adjournments and at the same time by giving good accommodation to the parties during trial, which can be done by undertaking the case management, by short adjournment in same cases where it appears the parties want to take adjournment to have adverse order so that he may challenge the adverse order and by this he may delay the matter more than what it could have done by seeking adjournment in the original court. This will also avoid unnecessary appeals, revisions and after amendment of the Civil Procedure Code, writs.

In view of the above, the order dated 31.5.2004 deserves to be set-aside. The order dated 20.9.2004 will not survive because of setting-aside the order dated 31.5.2004. The plaintiff-petitioner is permitted to cross-examine the witness DW-2 Kanmal at the cost of Rs.2,000/- to the respondent No.2.

Learned counsel for the respondent submits that defendant witness Kanmal will remain present in the Court on 22.12.2004, the date which is already fixed but for final arguments of the case. The petitioner shall have one opportunity to cross-examine the

witness and the trial court shall permit to cross-examine the witness DW-2 Kanmal on 22.12.2004 and in case it is adjourned from 22.12.2004, the trial court shall fix the date for cross-examination of the said witness as per the convenience of the Court as well as convenience of the party and no further opportunity shall be granted to the petitioner to cross-examine the said witness. The trial court is further directed to decide the suit itself within a period of two months thereafter because this court has already directed the trial court in earlier round of litigation to decide the suit expeditiously and much time has already passed.

Hence, this writ petition of the petitioner is allowed as mentioned above.

(PRAKASH TATIA)J.

RM/